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No. 84-1326

In the Supreme Court of the United States

OCTOBER TERM, 1984

PHILIP J. LAPLACA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's conviction should be reversed because of conversations that occurred after petitioner's arrest between a government agent and petitioner's wife.

2. Whether the courts below erred in rejecting petitioner's contention that his waiver of his *Miranda* rights was coerced by an agent's statement to him that his wife might also face arrest.

3. Whether the evidence was sufficient to sustain petitioner's drug conspiracy conviction.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. B) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1984. A petition for rehearing was denied on November 7, 1984 (Pet. App. C). The petition for a writ of certiorari was filed on January 3, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiracy to distribute methamphetamine, in violation of 21 U.S.C. 846, and possession of that drug with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was

sentenced to eight years' imprisonment.[1] The court of appeals affirmed by judgment order (Pet. App. B).

1. The evidence at trial showed that Drug Enforcement Administration agents established a surveillance at petitioner's residence. When petitioner's van approached, the agents pulled in behind him and turned on their red light and siren to identify themselves. Petitioner accelerated rapidly, driving past his residence. During the ensuing high-speed chase, petitioner emptied the contents of plastic bags out the window of the van and then discarded the bags themselves. When petitioner finally pulled over and the agents approached, he stated: "You're lucky I didn't have a gun or I would have shot you." C.A. Supp. App. 93-94.[2]

The agents arrested petitioner, secured the van, and searched briefly without success for the plastic bags he had discarded from the window. The agents then returned with petitioner to his house. During a warrant-authorized search of the residence, the agents seized a quantity of methamphetamine and assorted narcotics paraphernalia. On the way to the DEA office, petitioner, after having been given the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), stated in response to questioning that "the drugs are mine" and identified his supplier, whose name and telephone number appeared in petitioner's address book seized from his van. In addition, petitioner explained that he sold methamphetamine in "multi-ounce quantities * * * in rock form," that he used the paraphernalia seized from his house to convert the drug into that form, and that he had made a delivery to a customer earlier that day.

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[1]Petitioner received an additional one-year term of imprisonment on his subsequent conviction for becoming a fugitive following his sentencing in this case (see Pet. 4).

[2]"C.A. Supp. App." refers to government's supplemental appendix in the court of appeals.

Finally petitioner stated: "Just tell me one thing, tell me I didn't sell to an agent." C.A. Supp. App. 3-4, 94-115.

2. Before trial, petitioner moved to suppress his statements on the ground they were coerced by Agent O'Brien's statements to him following his arrest that his wife might also be arrested. At a hearing on that motion, Agent O'Brien stated that he told petitioner that his wife — who was in fact a confidential informant who had alerted the agents to petitioner's activities — "could have some jeopardy" with the local authorities (C.A. Supp. App. 6). The agent also told petitioner that although he had a right to do so, he did not confiscate money found in his wife's possession during the search of the residence (*id.* at 6-7). Petitioner testified that he answered the agent's questions "[b]ecause I knew [Agent] O'Brien prior to this * * * [and] I felt he wouldn't try and trick me" (*id.* at 9).

The district court denied the motion to suppress, making the following findings (C.A. Supp. App. 17-19):

> I find the questioning was not in a terribly strong or suggestive or threatening manner. * * *
>
> * * * * *
>
> Unquestionably, the statements were voluntary and not coerced, and I think any questioning about the wife was certainly not sufficient to rise to the level to overcome a voluntary response to questioning * * *.
>
> This is particularly true in light of the fact that this is not an unsophisticated young person who is arrested for the first time. This is a person who has been arrested approximately 13 times, and according to his testimony, advised of his rights on four prior occasions.
>
> Therefore, as I say, we are dealing with somebody who knows his way around. He is not likely to be easily misled or threatened by law enforcement officers.

> I think the circumstances are such that it could be concluded that the statements were voluntarily made and that [petitioner] waived his rights, was not under duress or constraints which would vitiate the waiver.

3. Petitioner also moved prior to trial to dismiss the indictment on the ground that his wife, Karen LaPlaca, continued to have telephone conversations with Agent O'Brien after petitioner's arrest and had allegedly revealed defense confidences to the government. At the hearing on that motion, Karen LaPlaca claimed that she identified potential defense witnesses to Agent O'Brien and told O'Brien that petitioner's defense would rest on his claim that the drugs did not belong to him (C.A. Supp. App. 37, 43). Agent O'Brien testified that he continued to speak to petitioner's wife following his arrest solely because he believed he was obligated to do so in light of her previous cooperation with the government; that each conversation was initiated by her; that he explicitly cautioned her not to tell him anything about defense strategy; that she divulged no attorney-client confidences to him; and that their conversations related almost exclusively to her own liability and to the status of the proceedings against petitioner. There was no testimony that anything petitioner's wife told O'Brien was ever related to, or used by, the prosecuting attorney. C.A. Supp. App. 56-82.

The District Court denied petitioner's motion with leave to renew it at the close of the trial. The court explained (C.A. Supp. App. 90-91):

> I think there obviously were communications back and forth. There were very innocent reasons why these communications should have taken place.
>
> It was quite natural that Mrs. LaPlaca would feel concerned about her role in it, particularly if her husband is going to be released on bail, and particularly if her husband is going to be acquitted.

> Informant number one [petitioner's wife] is in an embarrassing position if you're married to the defendant. I can see perfectly well why she would wish to telephone, and I can see why the government would want to, and would feel an obligation to talk with her and assist her in every way they could.
>
> But I don't yet see, first, what was communicated of the attorney-client relationship or trial strategy. Whatever was communicated, it hasn't been established that it got to [the prosecutor], except what got to him today.
>
> So, I think there is not a basis yet, certainly to dismiss the indictment, and I don't see any other relief in order at this juncture.
>
> I can almost visualize [the government's] case. I think it probably does not depend very much on any communications made after [petitioner's arrest]. But maybe it will be. We'll know better after the trial.
>
> I'll deny the motion with leave to renew it at the close of the trial. The circumstances may be a little different then.

The motion was not renewed.

ARGUMENT

1. Petitioner contends (Pet. 12-16) that his indictment should have been dismissed because of "the distinct possibility * * * that confidential [defense] information was revealed to the Government" by his wife (Pet. 16). This contention is foreclosed by the findings of the courts below. The district court found that there were legitimate reasons for the contacts between Agent O'Brien and petitioner's wife, and found no evidence that any attorney-client confidences or information relating to trial strategy had been communicated. These findings were amply supported by Agent O'Brien's testimony and were upheld by the court of

appeals. Petitioner suggests no reason for this Court to reexamine them.

In any event, even if defense strategy was communicated to Agent O'Brien, that would not warrant setting aside petitioner's conviction. In *Weatherford* v. *Bursey*, 429 U.S. 545, 550-559 (1977), a government informant attended meetings between a criminal defendant and his attorney; but the Court held that the defendant's Sixth Amendment rights had not been violated because the purpose of the informant's attendance at the meetings was legitimate, the informant did not communicate defense secrets to the prosecutor, and the defendant could not show any prejudice. Similarly, here, as the district court found, the purpose of Agent's O'Brien's contacts with petitioner's wife was not to learn defense strategy or secrets; there is, as the district court noted, no evidence that any such information was ever communicated to the prosecutor; and even though the district court permitted petitioner to renew his motion after the trial — when petitioner and the court would be better able to determine whether any disclosures made by petitioner's wife to Agent O'Brien adversely affected the defense — petitioner was unable to demonstrate prejudice. *Weatherford* accordingly dictates that petitioner is not entitled to have his conviction set aside.[3]

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[3] *United States* v. *Levy*, 577 F.2d 200 (3d Cir. 1978), on which petitioner relies (Pet. 14), is unhelpful to him for a number of reasons. In *Levy* the government informant — unlike petitioner's wife — was privy to the attorney-client relationship; he was a co-defendant represented by the same attorney as the defendant who raised the Sixth Amendment claim. Moreover, the informant in *Levy* disclosed attorney-client confidences to the government, and he disclosed them not just to law enforcement officers but to the prosecutor (see 577 F.2d at 205 n.2). While the court of appeals in *Levy* did not require a showing that the disclosure prejudiced the defendant, that aspect of *Levy* appears to have been overruled by *United States* v. *Morrison*, 449 U.S. 361 (1981), rev'g 602 F.2d 529 (3d Cir. 1979). In any event, *Levy* is a decision of the Third Circuit, the same court of appeals that rejected petitioner's claim.

2. Petitioner further contends that the inculpatory statements he made should have been suppressed because he was coerced into waiving his *Miranda* rights by Agent O'Brien's observation that his wife also faced arrest. This contention also cannot be sustained in view of the rulings of the courts below. The district court specifically found that the agent's comment about petitioner's wife was not coercive in its effect and that petitioner voluntarily waived his right not to speak to the officers. These conclusions were upheld by the court of appeals, and in view of the relatively innocuous nature of the agent's remark, petitioner's sophistication, and petitioner's own testimony that he spoke because he trusted Agent O'Brien and believed his cooperation would redound to his benefit, there is no reason for further review by this Court. We note also that Agent O'Brien's comment about petitioner's wife had the plainly legitimate purpose of concealing from petitioner the fact that his wife had been an informant against him.

3. Finally, petitioner claims (Pet. 6-9) that the evidence was insufficient to support his conviction on the conspiracy count. This claim is baseless. Drugs and drug paraphernalia and records were seized from petitioner's residence and van. Petitioner admitted that the contraband belonged to him, that he had purchased the drugs from one Jo Jo Childs, and that he had just returned from delivering methamphetamine to a substantial customer, Gary Johns. He also admitted that he used the seized paraphernalia to convert the methamphetamine, using a cutting agent, to rock form for distribution. See C.A. Supp. App. 128-131. As the district court explained in denying petitioner's motion for acquittal on grounds of insufficient evidence (*id.* at 130):

> The articles found in the van tended to corroborate defendant's statement, and [in] the telephone book under the letter "J" there was listed Jo Jo with a telephone number. A white sheet of paper had written on it

a number of figures which could be interpreted to represent the street value of various amounts of methamphetamine. The yellow sheet of paper had several names written on it with numbers after the names. One of the names was Gary, first name of Gary Johns.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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